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The Common Law of Slavery in Kentucky

by Thomas C. Glover

Introduction

Pivotal events in history are often not recognized at the time for the full import of their significance. In late August of 1619, such an event occurred with little fanfare. The *White Lion*, a ship owned by Robert Rich, the 2nd Earl of Warwick, arrived at Old Point Comfort in Hampton, Virginia. Among the cargo were 20 African slaves. These were the first slaves in British North America. In 2019, to commemorate the 400th anniversary of the arrival of slavery into British North America, *The New York Times Magazine* originated The 1619 Project, which takes a fresh look at slavery and its impact on the United States. As a *New York Times* subscriber, I have been following this project since it launched in August of 2019.

In the 2018-2019 academic year as a Donovan Scholar at Hopkinsville Community College, I took six hours of African-American history classes with Professor Don Hoover. During this course of study, I came to realize that there are great holes in this body of knowledge. In a search of the literature, it became apparent that there is a complete absence of any analysis of the Kentucky common law of slavery. Neither historians nor legal scholars have touched upon this topic. Historians generally do not have the legal skills to analyze a body of complex, archaic case law, and lawyers have no need to, since this body of cases is now useless to the modern practice of law.

I began to tackle this project in late 2019 and plan to present my final results at the Ohio Valley History Conference at Western Kentucky University in October of 2020. The theme of this year's conference is History Made Strange, which concentrates on the contributions that other academic fields can make to a better understanding of history. The paper I am presenting tonight is a preliminary assessment of what I have found to date. When I submit the final paper for publication, I will provide a copy to the Athenaeum Society for its archives.

The Legal Framework

There are 93 published cases in Kentucky which deal with the issue of slavery. The cases were all decided by the Kentucky Court of Appeals, which is what today we call the Kentucky Supreme Court. These published cases are what is often referred to as the common law. The search for cases began in 1792, when Kentucky became a state. The first case dealing with slavery was in 1803 in Franklin County, and the last case was in 1935 in Jessamine County. These cases are difficult to understand, since they were litigated before the modern rules of civil procedure and their emphasis on discovery of the facts. Lawyers at that time operated under an arcane writ system in which each side played a complicated game of legal chess. Therefore, these opinions do not contain the wealth of case facts contained in modern judicial opinions. However, these cases still represent a candid look into the social and economic world of slavery. Between the two sides in the dispute, one can still draw reasonable inferences from the opinions. When people litigate a claim, you can usually count on them to not hold back in an attempt to win.

Expansion of the Study

Once I had begun this project, it became apparent that the overwhelming body of the case law in Kentucky dealt with issues of emancipation. This was surprising to me, as I had expected the cases to primarily deal with title, warranty, punishment, and sale of slaves. I then began to look for an explanation. It began to dawn on me that geography may hold the answer.

When looking at the fifteen slave states of 1861, historians have divided them into three layers. The seven states of the Deep South were most committed to slave labor and the plantation system. These states were the first to secede, with all seven leaving the Union well before Ft. Sumter. The four states in the second layer only left the Union after Ft. Sumter surrendered on April 14, 1861, and Lincoln called for 75,000 volunteers the next day. Slavery was less vital to their economy. The last four were the border states of Kentucky, Missouri, Maryland, and Delaware. These states were the least dependent on slavery for their economic well-being and never seceded.

In order to understand the common law of slavery, it became clear that one must examine the cases from at least one state in each of the three layers of slave states. My study has now expanded to include the common law of Tennessee from the second layer and of Alabama from the seven Deep South states. By comparing the common law from each of the three layers, it is hoped that lessons can be learned about the nature of slavery in each region of the South.

Number of Cases by Type	
Emancipation	27
Estate/Emancipation	22
Estate	17
Contract	4
Criminal	3
Fugitive Slave Law (Fee)	3
Dred Scott Scenario	2
Support	2
Contract/Emancipation	2
Liability for slave escape/transport	2
Slander	1
Estate/Marriage	1
Real Estate	1
Adverse Possession	1
Emancipation/Deposition	1
Injury to Slave	1
Church Split	1
Restitution	1
Slave Punishment	1
<i>Total</i>	93

Type of Cases After 1865	
Estate	8
Estate/Emancipation	2
Slander	1
Estate/Marriage	1
Contract	1
Real Estate	1
Support	1
Child Support	1
Criminal	1
Church Split Over Slavery	1
<i>Total</i>	18

Decade by Volume of Cases	
1851 – 1860	21
1831 – 1840	17
1841 – 1850	16
1861 – 1870	10
1821 – 1830	9
1801 – 1810	5
1811 – 1820	3
1911 – 1920	3
1871 – 1880	2
1901 – 1910	2
1931 – 1940	2
1881 – 1890	1
1891 – 1900	1
1921 – 1930	1
1792 – 1800	0
<i>Total</i>	93

Decades in Chronological Order	
1792 – 1800	0
1801 – 1810	5
1811 – 1820	3
1821 – 1830	9
1831 – 1840	17
1841 – 1850	16
1851 – 1860	21
1861 – 1870	10
1871 – 1880	2
1881 – 1890	1
1891 – 1900	1
1901 – 1910	2
1911 – 1920	3
1921 – 1930	1
1931 – 1940	2
<i>Total</i>	93

**Counties by
Volume of Cases**

Jefferson	15
Fayette	5
Logan	5
Garrard	5
Shelby	5
Franklin	5
Madison	4
Montgomery	4
Unknown	4
Clark	4
Mason	2
Crittenden	2
Christian	2
Scott	2
Jessamine	2
Barren	2
Hardin	1
Elliott	1
Trigg	1
Hopkins	1
Powell	1
Bourbon	1
Nelson	1
Pike	1
Union	1
Estill	1
Pulaski	1
Kenton	1
Marion	1
Lincoln	1
Greenup	1
Fulton	1
Nicholas	1
Todd	1
Cumberland	1
Daviess	1
Woodford	1
Bullitt	1
Fleming	1
Mercer	1
Owen	1
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93

Cases by Region*

North		West		East	
Jefferson	15	Logan	5	Elliott	1
Fayette	5	Crittenden	2	Powell	1
Garrard	5	Christian	2	Pike	1
Shelby	5	Barren	2	Estill	1
Franklin	5	Trig	1	Pulaski	1
Madison	4	Hopkins	1	Cumberland	1
Montgomery	4	Union	1	Fleming	1
Clark	4	Todd	1	Greenup	1
Mason	2	Daviess	1		<hr/>
Scott	2	Fulton	1		8
Jessamine	2		<hr/>		
Hardin	1		17		
Bourbon	1				
Nelson	1				
Kenton	1				
Marion	1				
Lincoln	1				
Nicholas	1				
Woodford	1				
Bullitt	1				
Mercer	1				
Owen	1				
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	64				

**Cases through 1865 and After 1865,
by Region***

	1792-1865	1866-1940	Total
North	52	12	64
West	13	4	17
East	6	2	8
Total	71	18	89

*Totals do not include four cases whose county of origin is unknown.